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Docket: CR 10-01-30376
(Winnipeg Centre)
Indexed as: R. v. Clark et al
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

HER MAJESTY THE QUEEN,

- and -

PAUL BRADLEY CLARK AND
GRAEME BEATTIE,

Accused.

) **APPEARANCES:**

)

) Robert Tapper, Q.C.

) and Jason Kendall

) for the Crown

)

) Aaron A. Fox, Q.C. and

) Darren K. Kraushaar

) for Paul Bradley Clark

)

)

) Michael D. Edelson and

) Solomon Friedman

) for Graeme Beattie

)

)

) Judgment delivered:

) September 12, 2012

JOYAL, C.J.Q.B.

I. INTRODUCTION

[1] The two accused, Paul Bradley Clark and Graeme Beattie (hereafter "Constable Beattie" and "Constable Clark"), are members of the Winnipeg Police

Service. They are charged jointly on an indictment with one count of "attempt to obstruct justice". That count reads as follows:

Attempt to Obstruct Justice
Section: 139(1) C.C.
Count No. 1 – 1 Count

THAT THEY, the said PAUL BRADLEY CLARK and GRAEME BEATTIE, between the 5th day of May, 2008 and the 31st day of October, 2008, at the City of Winnipeg, in the Province of Manitoba, wilfully did attempt to obstruct the course of justice in a judicial proceeding, by the preparation of false notes, and false police reports intended to be used by Crown Counsel for the purposes of the prosecution against Isaac Chartrand and for disclosure to his defence counsel.

[2] While on patrol and working as partners on May 5, 2008, the accused attended to the backyard of 618 Redwood Avenue in the City of Winnipeg. In the course of their attendance to that address, Constable Beattie arrested Isaac Chartrand (hereafter "Chartrand") who was soon thereafter charged with possession of crack cocaine for the purpose of trafficking. In the course of carrying out their duties in respect of their attendance to 618 Redwood Avenue and the arrest of Chartrand, Constable Clark prepared an arrest report and Constable Beattie prepared a police narrative report. In addition, both prepared their own notes in their respective notebooks.

[3] Having made those reports and notes, the allegation of "attempt to obstruct justice" arises from alleged comments or revelations made by Constable Beattie (and endorsed by Constable Clark) during a very brief conversation with a senior Federal Crown prosecutor, Ms. Erin Magas (hereafter "Ms. Magas" or "Magas"). The conversation (and the alleged revelations) took place in an interview room the morning of and just prior to the preliminary inquiry

concerning Chartrand's "possession for the purpose of trafficking" charge. The two accused, who at the time were comparatively very junior officers, were scheduled to testify at that preliminary inquiry. As of that date, both accused had for all intents and purposes no experience testifying in court. Both accused were, on the morning of October 31, 2008, understandably nervous and had in the previous weeks, in preparation for the preliminary inquiry, reviewed their notes and report with the requisite and commensurate care of junior officers preparing for court.

[4] It was during the very brief conversation in the interview room on October 31, 2008 just prior to the commencement of court – with only the accused and Ms. Magas present – that Ms. Magas alleges that Constable Beattie (who was doing most if not all of the talking) and Constable Clark (who even if completely silent was seen to confirm and endorse Constable Beattie's comments) revealed what she interpreted as inconsistencies as between what Constables Beattie and Clark initially observed and did (just prior to and after Chartrand's arrest on May 5, 2008) and what they actually recorded in their notes and reports. In the context of what and how it was said, Ms. Magas interpreted the accused's indications on the morning of October 31, 2008 as tantamount to an admission on their part that they had falsified their notes and reports, notes and reports which were much earlier disclosed to Chartrand's defence counsel and which were obviously provided to the Crown and the defence for the purposes of being

relied upon in the connected prosecution which was taking its natural course through the courts.

[5] Following that approximately one to 1½ minute conversation in the interview room just prior to the scheduled preliminary inquiry and based upon the conclusion that she had drawn about the falsification of the notes and reports, Ms. Magas indicated to both accused that she would be obliged to stay proceedings in the Chartrand prosecution.

[6] Upon returning to her office later that morning, Ms. Magas spoke to her supervising counsel. At his direction, Ms. Magas prepared a memorandum that was sent to the Chief of the Winnipeg Police Service.

[7] Constables Beattie and Clark were subsequently charged with “attempt to obstruct justice”.

[8] Despite some of the testimony and focus about the actions of Constables Beattie and Clark while at 618 Redwood on May 5, 2008, this case will not turn on whether while at that address, they together or separately committed a breach of the ***Canadian Charter of Rights and Freedoms*** (the “***Charter***”). Instead, what this case is about is whether two accused police officers willfully and knowingly prepared false notes and false police reports (about what they did at 618 Redwood on May 5, 2008) for the purposes of obstructing justice.

[9] Given the governing law, the specific manner in which the offence is charged in the indictment and the theory of the Crown, the relevant issues in this case can be reduced to the following questions:

- (1) Did Constable Beattie and Constable Clark knowingly prepare "false notes" and "false police reports"?
- (2) If Constable Beattie and Constable Clark did knowingly prepare "false notes" and "false police reports", does such conduct have a tendency to obstruct, pervert or defeat the course of justice?
- (3) Did Constable Beattie and Constable Clark intend to obstruct, pervert or defeat the course of justice?

II. BACKGROUND AND CONTEXT

[10] What follows is a presentation of the background and contextual facts surrounding the investigation which led to the criminal charge as against Isaac Chartrand and the scheduling of his preliminary inquiry, just before which the relevant and critical conversation took place between the two officers and Ms. Magas.

[11] Much of what follows was provided in the submissions of defence counsel whose submissions, based on the evidence I heard, I accept as accurately representing basic background and context. Many of these facts are uncontested or unchallenged. If and where any of the facts presented below can be identified as facts which were directly or indirectly contested by the Crown, it should be assumed that I have nonetheless found the facts as set out below to be true, based upon the evidence that was before me and based upon what I would have determined the Crown could not establish, or could not and did not successfully challenge. Any such determinations are explained and

should be better understood in light of my assessment of the witness which I address later in this judgment.

The Events of May 5, 2008

[12] On May 5, 2008, Constables Beattie and Clark were partners and were working the day shift in the City of Winnipeg. Constable Beattie had been a member of the Winnipeg Police Service for approximately 1½ years and Constable Clark for approximately three years. During the course of their duties on May 5, 2008, they patrolled District 3 located in the north end of Winnipeg. It is an area in which a significant amount of drug and gang activity takes place.

[13] Prior to the accused's patrol on May 5, 2008, they were briefed (as are all other members about to go on patrol) so as to be aware of certain addresses, individuals and phone numbers in the District 3 area. This "briefing" included the identification of individuals (whose names were noted on a big white board) who were suspected of being involved in drug activity and the phone numbers associated with "dial a dope" drug sales. The name Isaac Chartrand and the address of 618 Redwood were noted on the relevant white board at the District 3 station.

[14] While on patrol at approximately 11:00 a.m., Constables Beattie and Clark had occasion to speak to an individual. Constable Beattie entered the individual's name into the computer in their police car and made inquiries of the individual. As a result of that conversation with that individual, it was revealed that drug activity was taking place at 618 Redwood. The individual with whom they were

speaking gave the two officers the name of "Isaac" and stated that he was "pushing a lot of crack out of that address". Constable Beattie conducted further checks on the computer respecting 618 Redwood and the name Isaac Chartrand came up as being associated with that address. A CIPIC search of Chartrand was conducted which revealed that he was a suspected drug dealer. Constables Beattie and Clark agreed that if they had time before the shift was completed, they would drive by that address. Given the earlier briefing that occurred at the beginning of their patrol shift, such a patrol past a residence like 618 Redwood would be part of the officers' normal and expected duties.

[15] Near the end of their shift, at approximately 4:30 p.m., Constable Clark suggested that they drive by 618 Redwood. They accordingly drove down the back alley of Redwood where they observed some individuals in the backyard of a house (unbeknownst to Constables Beattie and Clark that backyard was the backyard of 618 Redwood). The individuals there were noted to be loud and yelling, and they further appeared to be involved in some form of altercation. Constables Beattie and Clark stopped their vehicle one house down from the backyard where they observed the individuals, exited their vehicle and walked toward the yard. The individuals were in the backyard of 618 Redwood, one of whom was Isaac Chartrand. Chartrand was approximately 5 ft. 7 in. The officers entered the yard. Chartrand immediately ran towards the house. As Chartrand proceeded to run, a clear plastic bag containing items wrapped in tin foil fell (from his person) onto the ground.

[16] Constable Beattie ran into the residence and pursued Chartrand while Constable Clark remained outside the residence with the three other individuals. All of the three individuals outside the residence provided their names, addresses and phone numbers which Constable Clark noted.

[17] Constable Beattie soon exited the residence with Chartrand in custody. Constable Clark had not specifically identified Chartrand before he ran into the house, but there was no doubt in his mind that the person in Constable Beattie's custody, exiting the house, was the same person after whom Constable Beattie ran into the house.

[18] At the scene, Chartrand claimed that the crack cocaine was not his. Chartrand was placed in the police car during which time he stated to Constable Clark that the crack cocaine belonged to Johnathan Laporte who was one of the other three males in the yard. Both Laporte and Chartrand were initially arrested and taken to the police station. There, Laporte denied that the drugs were his. In fact, Laporte was at no point in time found in possession of any drugs and he was not observed to be in possession of any drugs. In addition, Laporte is approximately 6 ft. 3 in. tall versus Chartrand who is 5 ft. 7 in. tall. Both Constable Clark and Constable Beattie were certain that it was Chartrand who had dropped the drugs on the ground as he ran into the house as earlier described.

[19] After discussing the matter with their sergeant, it was determined that Constable Clark and Constable Beattie would charge Chartrand with possession for the purpose of trafficking and that he would be detained in custody.

[20] It was determined that Laporte would not be charged and could be immediately released.

[21] As a result of the arrest and the drug charges against Chartrand, Constables Clark and Beattie were required to do the connected paperwork that must be done in the ordinary course. In that regard, Constable Clark prepared his notes and an arrest report. The arrest report is usually, and was in this case, a short summary of the file. For his part, Constable Beattie prepared his notes and a narrative report, which is the officer's more detailed report of what happened.

[22] A preliminary inquiry date was set for October 31, 2008. At the time of the preliminary inquiry date, Constables Beattie and Clark had virtually no experience as witnesses. In his preparation for the preliminary inquiry, Constable Clark decided to review his notes and Constable Beattie's narrative report. In the context of that preparation, Constable Clark specifically noted two things, both of which he mentioned to Constable Beattie.

[23] The first thing that he specifically noted and mentioned to Constable Beattie was that the individual Constable Beattie chased running into the residence at 618 Redwood, had been wearing a darker shirt when he entered the residence but a light coloured shirt when he emerged. The second thing noted

by Constable Clark and communicated to Constable Beattie was that he (Clark) did not see Constable Beattie pick up the drugs (which fell from Chartrand) before he went into the house giving chase to Chartrand (Constable Beattie's indications were to the contrary). Instead, Constable Clark mentioned to Constable Beattie that he thought he had seen Constable Beattie pick up a clear plastic bag as he, Beattie, exited the house. For his part, Constable Beattie told Constable Clark and later confirmed in his testimony at trial, that he did not recall picking up anything as he left the house, but he did in fact pick up the bag of drugs before going into the residence while giving chase. Based on their testimony at trial, Constables Beattie and Clark were aware that there was a video camera set up in the backyard. Given the two issues which Constable Clark noted above and which were raised with Constable Beattie, the two officers testified that they believed it would be appropriate that the Crown prosecutor be made aware of a possible video recording which might assist in showing, on the question of identity, that Chartrand was wearing the two different coloured shirts. They also believed it would further confirm when the bag of crack cocaine was picked up.

[24] Although both were comparatively junior officers, Constables Beattie and Clark had been instructed that if they had a question for a prosecutor or had reason to raise something with a prosecutor, the easiest way to do so would be to meet with the prosecutor prior to the court proceeding – in this instance, the preliminary inquiry. It was on the basis of that advice that they intended to have

a conversation with the prosecutor prior to the preliminary inquiry and advise him or her of the points noted by Constable Clark in his review of the report about which he and Constable Beattie had the above-mentioned discussion.

The Morning of the Preliminary Inquiry: October 31, 2008

[25] On the morning of the preliminary inquiry, Constables Clark and Beattie met with the Federal prosecutor, Ms. Magas, who appeared to be in a hurry and already frustrated at the fact that another drug-related preliminary inquiry that she was conducting that morning (R. v. Keesick) was falling apart. It was Constable Beattie who approached Ms. Magas, who was in the courtroom where the preliminary inquiries were scheduled to proceed, and it was he who asked if he and Constable Clark could meet with her.

[26] At the time, she was speaking to Chartrand's defence counsel. After Ms. Magas communicated to Constable Beattie that she would speak to he and Constable Clark shortly, Constable Beattie overheard Ms. Magas say to the defence counsel on the Chartrand matter, "So you just want to take a run at my two guys?" That reference was in relation to an anticipated **Charter** issue to be raised by the defence.

[27] Prior to Ms. Magas speaking to Constables Beattie and Clark, she had occasion on the R. v. Keesick file to meet with the arresting officers and the designated drug expert in that case (Constable Jeffrey Stalker, now Detective Sergeant Stalker). In respect of that prosecution, it turned out that the arresting officers had failed to seize a key piece of evidence and the purpose of Ms.

Magas' discussion with the officers and the expert, Detective Sergeant Stalker, was to determine whether he (Detective Sergeant Stalker) could still give an opinion that in the circumstances, could establish that the possession was for the purpose of trafficking. In short, the status of the Keesick prosecution was now, just prior to the preliminary inquiry commencing, very much in doubt. During this meeting (about which Constables Beattie and Clark had no connection and were not present), Ms. Magas was described as being abrupt, intimidating and unprofessional.

[28] It was following that meeting on the Keesick matter that Ms. Magas met with Constables Beattie and Clark. At the time she entered the interview room for that conversation, Ms. Magas already knew that the Keesick matter may not be going ahead because of the problem with missing evidence and as well, she had already run past the 10-minute adjournment she had been provided by the court before the formal commencement of the proceedings scheduled for that morning.

[29] During that meeting, a brief discussion took place with respect to the issues as Ms. Magas saw them and some of the facts that she gleaned from the file. Constable Beattie who was speaking on behalf of both officers, asked Ms. Magas if there had been any disclosure by the defence of a video from the surveillance camera which the officers noted at the back of the house. Ms. Magas advised that there had not and that there was no obligation on the defence to provide such disclosure. Ms. Magas then asked what would be on the

video if there was one. It was at that point that Constable Beattie mentioned the issue of the different coloured shirts and as well, the issue of when the bag of cocaine was picked up.

[30] The precise nature of what was said during the approximately one to 1½ minute conversation with Ms. Magas, differs according to the recollection of Ms. Magas and Constables Beattie and Clark respectively. Their recollections and my determinations in that regard are discussed later in this judgment.

[31] Despite the discrepancies as to what was said and how it was said, Ms. Magas did not, during that conversation in the interview room, conduct a detailed review with either officer of their actual notes or reports in respect of their accuracy or in respect of what it was she was being told by them in the interview room. Neither was there separate questioning of the officers. It would appear that Ms. Magas immediately concluded that the notes and reports were not accurate. On the basis of her interpretation and her understanding of what she was being told, without further questioning or review of their notes or reports, she decided to enter a stay of proceedings on the Chartrand matter and the file was concluded.

III. LEGAL FRAMEWORK

[32] The relevant section under the ***Criminal Code***, R.S.C. 1985, c. C-46, s. 139(2), under which this prosecution has proceeded, reads as follows:

(2) Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

[33] While the indictment proffered by the Crown specifies that Constables Beattie and Clark are charged under s. 139(1) of the **Criminal Code**, the subsection number would appear to be in error and it is in fact a charge under s. 139(2). The *actus reas* for an offence under s. 139(2) of the **Criminal Code** is established only if the act is intended to defeat or obstruct the course of justice. It is an offence of specific intent. In other words, the prosecution must prove beyond a reasonable doubt that the accused intended to act in a way tending to obstruct, pervert or defeat the course of justice. See **R. v. Kotch** (1990), 61 C.C.C. (3d) 132 (Alta. C.A.); **R. v. Charbonneau** (1992), 74 C.C.C. (3d) 49 (Que. C.A.), leave to appeal refused, [1992] 3 S.C.R. VIII, S.C.C.A. No. 239 (QL); **R. v. Graham** (1985), 20 C.C.C. (3d) 210 (Ont. C.A.), aff'd [1988] 1 S.C.R. 214; **R. v. Savinkoff**, [1963] 3 C.C.C. 163 (B.C. C.A.); **R. v. Hoggarth** (1957), 119 C.C.C. 234 (B.C. C.A.).

[34] Respecting the *actus reas* for this offence and this particular count, the Crown is required to establish beyond a reasonable doubt that Constables Beattie and Clark prepared (i.e. made or created) false reports. It must also establish that this act had the tendency to obstruct, pervert or defeat the course of justice.

[35] As it relates to the *mens rea*, the Crown must prove beyond a reasonable doubt that the act of making false reports and making false notes was done with the specific intention of obstructing, perverting or defeating the course of justice.

[36] It should be noted that in the particular circumstances of the present case, given the specific allegation concerning the preparation and filing (with the Crown) of false reports and notes, it is both logically and legally required that as part of the guilty mind (or *mens rea*) of the two accused, the Crown must establish beyond a reasonable doubt that the accused had knowledge of the falsity of their actions (their notes and reports). See **R. v. Savinkoff**, *supra*, at para. 32. Where the Crown chooses to particularize an offence as here (that the notes and report were “false”), that particular becomes part of the element that must be proven beyond a reasonable doubt and is not mere surplusage. Accordingly, in the present case, given the allegation as contained in the indictment’s one and only count, the Crown is required to prove beyond a reasonable doubt that Constables Beattie and Clark knew that the notes and reports were false. See **R. v. S.S.** (2002), 155 O.A.C. 287 (Ont. C.A.). It is not sufficient for the Crown to simply establish the reports or notes (with reference to what happened) are inaccurate, inconsistent or mistaken.

[37] In addition to a full and complete consideration of all of the evidence adduced at trial, the court must also examine carefully the evidence of both accused who testified at trial. As always, this court will be guided by the time-honoured proposition that it can believe some, none or all of a witness’ evidence. At the same time, however, given that Constables Beattie and Clark did testify in their own defence, the court need conduct its consideration of their testimony using the procedure outlined by Cory, J. in **R. v. W. (D.)**, [1991] 1 S.C.R. 742:

- (1) If you believe the evidence of the accused, you must acquit;
- (2) If you do not believe the testimony of the accused, but are left in reasonable doubt by it, you must acquit;
- (3) Even if not left in doubt by the evidence of the accused, you still must ask whether you are convinced beyond a reasonable doubt of the guilt of the accused on the basis of the balance of the evidence which you do accept.

[38] With the above **W. (D.)** formulation in mind, I will note at this juncture, as a practical matter, that if I accept the testimony of Constables Beattie and Clark as given at trial (about which I review and make comment later in this judgment), I will not be able to conclude beyond a reasonable doubt that they prepared false notes and false reports, let alone that they made the admissions that Ms. Magas alleges were made on the morning of October 31, 2008.

IV. POSITIONS OF THE PARTIES

Position of the Crown

[39] It is the theory of the Crown that Constables Beattie and Clark made false notes and police reports in order to justify first, their entry onto the property at 618 Redwood (for which they would have otherwise had no reasonable and probable grounds) and second, to justify Constable Beattie's entry into the dwelling house at 618 Redwood (for which Constable Beattie also did not have legal grounds to enter without a warrant). More specifically, it is alleged that Constables Beattie and Clark falsified in their notes and reports, information that

was given to the Crown and defence counsel respecting a "fight" that was used to justify their entry onto the property, and information about Constable Beattie having picked up and seen the bag of cocaine before giving chase to the individual who ran into the dwelling house at 618 Redwood.

[40] As part of the above theory, the Crown at various times in cross-examination and its final submission, suggested alternately (without substantiating evidence at trial) that the officers had specifically targeted 618 Redwood and Isaac Chartrand, that there was no actual disturbance at 618 Redwood and that there were no drugs dropped by anyone outside of 618 Redwood. The Crown submits in essence that Constables Beattie and Clark (although not so charged) conspired to gain entry into the yard of 618 Redwood, and they also conspired to gain entry into the house at 618 Redwood.

[41] As a foundational part of its proof in this prosecution, the Crown relies determinatively on the evidence of Ms. Magas, the only witness in the interview room with the two accused during the brief conversation on the morning of the preliminary inquiry on October 31, 2008. The Crown submits that Ms. Magas' evidence is both credible and reliable respecting what she heard and observed during an encounter that may have lasted no longer than one to 1½ minutes. The Crown submits that when one examines the police notes and reports and when one considers what Ms. Magas heard Constable Beattie say (confirmed and endorsed by Constable Clark's silence) on October 31, 2008, given the context of this discussion, just before their testimony, there should be little doubt that in

that October 31, 2008 conversation, Constables Beattie and Clark did nothing short of admitting that they had falsified their notes and reports.

[42] It is from that conversation in the interview room, just prior to the preliminary inquiry on October 31, 2008, that the Crown suggests that the accused were identifying two important discrepancies or inconsistencies as between what was then being told to Ms. Magas and what had earlier been recorded in their respective notes and reports: whether there was a fight in the backyard at 618 Redwood and whether the bag of crack cocaine was picked up before Constable Beattie went into the house.

[43] The Crown takes the position that its evidence clearly establishes that when the accused attended to the Law Courts Building on the morning of the preliminary inquiry of October 31, 2008, their comments to Ms. Magas constituted an admission respecting their falsification of their police notes and reports. The Crown argues that the evidence of both accused should not be accepted or believed, as it is not credible and in the context of the proven facts, does not make sense. The Crown urges the court to reject the evidence of both Constables Beattie and Clark. Further, the Crown argues that their evidence does not raise a reasonable doubt concerning any of the essential elements that must be proven beyond a reasonable doubt. The Crown contends that based upon all of the evidence, including what it submits was the reliable and credible evidence of Ms. Magas, it has met its burden and established beyond a reasonable doubt the following: that both accused prepared an arrest report and

notes that they knew were false; the false arrest reports and notes were filed with the intention to obstruct justice; and that act of preparing and filing such false arrest reports and notes is an act which tends to obstruct the course of justice.

Position of the Defence

[44] It is the position of the defence that on a proper application of the procedure in ***W. (D.)***, *supra*, and a fair evaluation of the *viva voce* testimony given by Constables Beattie and Clark, their testimony should be accepted and that alone should result in an acquittal. Defence counsel submit, as I agreed earlier, that given what Constables Beattie and Clark said in their testimony, the acceptance of their testimony would pre-empt a finding beyond a reasonable doubt that they intentionally prepared false notes and reports for the purposes of obstructing the course of justice.

[45] Defence counsel further argue that even if the accused's evidence was not accepted in its entirety, it ought to raise a reasonable doubt in respect of the essential elements the Crown must prove.

[46] While arguing strongly that the court's application of the first and if necessary, the second stage of ***W. (D.)*** should conclude in a determination favourable to each accused, the defence also submits that even if the accused's evidence was not accepted and that it did not raise a reasonable doubt, the totality of the evidence does not establish beyond a reasonable doubt the guilt of Constables Beattie and Clark.

[47] As part of its argument respecting the inadequacy of the Crown evidence, the defence argues that parts of the Crown theory are without evidentiary foundation and/or alternatively, inconsistent and illogical. In this regard, the defence suggests that to the extent that the Crown (at various times in cross-examination or final submissions) suggested that Constables Beattie and Clark specifically targeted 618 Redwood and Chartrand, and that they specifically conspired to gain entry onto the property of 618 Redwood and into the house at 618 Redwood, such submissions are unsupported by the evidence and make no logical sense.

[48] In addition, as part of its argument respecting the inadequacy of the Crown proof, the defence points to and impugns the critical evidence of the Crown's principal witness, Ms. Magas. In that regard, the defence submits that the case for the Crown rises and falls on her testimony. That testimony, according to the defence, cannot be the basis for a conviction given that at least one of the defence counsel asserted that she was not a credible witness. Both defence counsel vigorously contend that Ms. Magas' memory and recollection about the events in question was not reliable and is the product of misunderstanding and erroneous impressions.

V. EVIDENCE ADDUCED AT TRIAL

[49] Along with any stipulated agreements, the evidence presented at trial included various exhibits and evidence given *viva voce*.

[50] The exhibits included the following:

- Exhibit 1 (entered by the Crown) – Book of Documents;
- Exhibit 2 – (entered by the defence) - Photocopy of front of Crown file for Isaac James Chartrand;
- Exhibit 3 – (entered by the defence) - Certified copy of transcript for October 31, 2008 respecting proceedings in Courtroom 409, 408 York Avenue;
- Exhibit 4 – (entered by the defence) - Winnipeg Police Service Unit History D302-20080505;
- Exhibit 5 – (entered by the defence) - Single photo of rear of 618 Redwood Avenue;
- Exhibit 6 – (entered by the defence) - Subject Profile – Isaac Chartrand;
- Exhibit 7 – (entered by the defence) - Winnipeg Police Service Unit History D381-20081031;
- Exhibit 8 – (entered by the defence) - Subject Profile – Johnathan Laporte;
- Exhibit 9 – (entered by the defence) - Printout of telephone numbers.

[51] The *viva voce* evidence at trial included evidence adduced by both Crown and defence.

[52] Set out below is a brief review of the especially relevant testimony given by each witness insofar as that evidence touches upon areas of particular importance for the issues that will require my determination.

Erin Magas

[53] Erin Magas gave evidence in respect of her role as a senior Federal prosecutor who, because of the unavailability of other prosecutors at the time, assigned herself to the prosecution of the preliminary inquiry relating to Isaac Chartrand (which was scheduled to take place October 31, 2008). She is currently a “team leader” with the Public Prosecution Service of Canada and one of five prosecutors on the management team.

[54] On the morning of October 31, 2008, there were two matters set to proceed to preliminary inquiry in Courtroom 409 – 408 York Avenue (the courtroom which was typically used by the Public Prosecution Service of Canada to conduct their matters in Provincial Court). One of those prosecutions set to proceed to preliminary inquiry on October 31, 2008 was the case of R. v. Chartrand and the other, R. v. Keesick.

[55] Ms. Magas testified that in the ordinary course, her office would have received as part of the police disclosure package, copies of the police narrative (in this case prepared by Constable Beattie) and the police arrest report (in this case prepared by Constable Clark). In addition to a printout of Chartrand’s criminal record, the Crown would have also received prior to the preliminary inquiry, a copy of the officers’ notes. That disclosure package would have been provided to the defence counsel who, like the Crown, relies upon such disclosure for the purposes of preparing for subsequent hearings and formulating positions

respecting, amongst other things, subsequent pleas, the identification of issues and for the formulation of tactics and strategy.

[56] On the morning of October 31, 2008, Ms. Magas arrived at court some time after 9:30 a.m. She began dealing with the witnesses in relation to the case of R. v. Keesick, about which she learned that there was a potential problem relating to the unavailability of certain exhibits, which unavailability might pose problems for the viability of the prosecution (a charge of "possession for the purpose of trafficking").

[57] Given that potential problem, she asked, amongst other things, the Exhibit Officer and the identified drug expert witness for that case (Detective Sergeant Jeffrey Stalker) to go to a nearby interview room so that they might determine whether the prosecution could still proceed as planned.

[58] Prior to attending the interview room to further discuss the viability of the Keesick prosecution, Ms. Magas entered into a conversation with defence counsel on the case of R. v. Chartrand. It was at that time that Constable Beattie, also standing in Courtroom 409, mentioned that he and Constable Clark wished to speak to Magas. Magas testified that she could not speak to them just yet, but would get to them soon. Magas testified that she continued her conversation with defence counsel on the Chartrand matter, during which she asked what if any issues existed. She was advised by defence counsel that the only issues were **Charter** related. A consent committal to the Court of Queen's Bench was briefly discussed, after which it was decided that the preliminary inquiry for the

Chartrand matter could be considerably shortened given the identified issues and given that defence counsel requested the Crown to “put up” the two police officers (Constable Beattie and Constable Clark) only for the purposes of cross-examination.

[59] Ms. Magas testified that by this time, the presiding Provincial Court judge was ready to enter the courtroom for the purpose of at least being informed of how the proceedings that day were expected to unfold. As reflected in the transcript marked as Exhibit 3, Ms. Magas explained to the Provincial Court judge that she expected both matters to proceed, although they were to be brief. After so advising the court, a recess of (what was supposed to be) 10 minutes was taken so that the Crown could organize the witnesses and “gather my ducks in a row”.

[60] By the time Ms. Magas would next address the court, well past the 10-minute recess stipulated on the record, she had already decided, after conversations with the officers involved in the prosecution of R. v. Keesick (especially the drug expert, Detective Sergeant Stalker) and the officers involved in R. v. Chartrand (Constables Beattie and Clark), that neither case would proceed as originally charged. In the case of R. v. Keesick, because of problems with the unavailable exhibits, Ms. Magas would be obliged to accept a plea to the lesser included offence of simple possession. Respecting the case of R. v. Chartrand, because of her conversation with Constables Beattie and Clark, she determined to enter a stay of proceedings.

[61] The conversation with Constables Beattie and Clark took place not long after Ms. Magas had first addressed the court requesting the additional 10-minute recess. It was during what was supposed to be that same 10-minute recess that she would have had a conversation with the officers in R. v. Keesick.

[62] Magas testified that she met with Constables Clark and Beattie in a nearby interview room which is approximately eight feet by eight feet in size. Prior to commencing her discussions with Constables Beattie and Clark, based upon her reading of the officers' notes and police reports, she believed that the prosecution of Chartrand was largely a case of "hot pursuit". In other words, Constable Beattie's entry into the residence at 618 Redwood without a warrant could be justified based upon his pursuit of the accused after having seen that the bag the accused dropped to the ground was crack cocaine.

[63] In the interview room, Ms. Magas testified that one officer was sitting beside her and one officer was standing. She related to the officers that everything "looked fine" and that the only issue was a **Charter** issue about which she had little concern. It was at that point, according to Magas, that Constable Beattie asked whether there was a video on file. Magas replied "No, should there be?" Constable Beattie then said that there was a video camera at the back of the house at 618 Redwood, but he was not sure if it was working. According to Magas, there seemed to be some confusion in the officers' minds as to whether or not the defence was required to disclose any such video if one

existed. Magas testified that it was at that point that she explained to the officers that generally, the defence has no duty to disclose such items.

[64] Magas confirmed in her testimony that most if not all of the conversation was with Constable Beattie, but at no point did Constable Clark correct or take issue with what Constable Beattie was asking or saying. Indeed, she cannot recall what if anything Constable Clark had said during the entire discussion in the interview room.

[65] Magas also confirmed in her testimony that she was not taking any notes and her recollection of the conversation was certainly not verbatim. Magas further confirmed that for the most part, she cannot recall with any precision what if any questions she would have put to the officers prior to getting those answers she more or less recalls the officers giving.

[66] Magas testified that after advising Constable Beattie that the defence has no disclosure obligation, such so as to require it to provide a video, she noted that the two officers started to look at each other. Magas said she became somewhat concerned and believed that she asked them something to the effect of "If a video existed, would it show a version different than that given in your notes?" According to Magas, Constable Beattie said that it would show that the individual who ran into the house would have had on a different shirt by the time he came back out of the house following Constable Beattie's detention of him.

[67] Based upon Magas' perception that the two officers seemed "fixated" on the video, Magas testified that she proceeded to "go through" some of the other

details. In that regard, she testified that she recalls asking something to the effect of whether there was actually a fight. Constable Beattie's response was that there was no fight and that they actually knew the house to be a known crack house when they patrolled up the back lane and saw the four individuals in the backyard in lawn chairs. According to Magas' testimony, Constable Beattie further explained that when he and Constable Clark entered the backyard, the four individuals scattered and the one individual (Chartrand) ran into the house just prior to which he dropped a bag. Magas testified that she asked Constable Beattie "Did you pick up the baggie?" Magas' recollection of Constable Beattie's response was that he said "no" and that further, he did not see if it contained cocaine. According to Magas' testimony, Constable Beattie did say that once inside the house and once Chartrand was under arrest, Chartrand was found in possession of cocaine.

[68] By this time in the conversation, Magas testified that she was now in receipt of information that caused her to determine that there was in fact no fight in the backyard, and that Constable Beattie had not picked up, seen or concluded that the baggie (dropped by Chartrand as he was running into the house) was in fact cocaine. Accordingly, she was of the view that there were now serious **Charter** issues respecting whether there existed a valid justification for entering onto the property at 618 Redwood and further, respecting Constable Beattie's entry into the dwelling house on that property. Moreover, given Magas' interpretation of the officers' conduct (in the preparation of their notes and

report), it was her view that on a s. 24(2) **Charter** analysis, there would not be a favourable determination on the question of police "good faith".

[69] Ms. Magas acknowledges that Constables Beattie and Clark did at one point say something about telling the Sergeant about what had occurred. Nonetheless, based upon what she believed she heard and understood from the officers in the interview room, she proceeded to tell Constables Beattie and Clark that she would be directing a stay of proceedings. She also explained that she would have to tell her supervisor about what had occurred. Magas testified that she later explained to the officers that no accused is worth ruining your career. She believes she made reference to what were at the time, perjury charges relating to other police officers. According to Magas, "they" said something to the effect that they were aware of that and that is why they said what they said.

[70] It need be repeated that Magas acknowledged that at no point was she taking contemporaneous notes and accordingly, she cannot provide testimony as to the verbatim conversation, nor can she recall what if any additional questions by her may have prefaced, some of what she believes the two officers to have said or endorsed.

[71] Magas confirms that the conversation in the interview room was "very very short". She conceded that it was possible that the conversation was no longer than 1½ minutes.

[72] Upon her eventual return to her office, at the direction of the Chief Federal Prosecutor, her supervisor, Magas prepared a memorandum that she believed was to be sent to the Chief of Police.

[73] In cross-examination, Ms. Magas was vigorously challenged in relation to the accuracy of her recollections, interpretations and impressions respecting the very brief conversation on October 31, 2008 during which she took no contemporaneous notes. Despite Ms. Magas' sometime stubborn tone and insistence in the face of relatively straightforward questions (about which the court was required on a couple of occasions to direct that greater care be taken to listen and respond), defence counsel's cross-examination succeeded in revealing weaknesses in certain aspects of Magas' ability to accurately and objectively remember, interpret and understand what she saw and heard on October 31, 2008. Those aspects include things which a court need examine as relevant when assessing the reliability of a witness' testimony, especially when that evidence forms the foundational basis for the Crown case. I more fully discuss the identifiable concerns with Magas' testimony (which can be characterized as concerns respecting her reliability) at paragraphs 148 to 164 in the analysis portion of this judgment.

[74] To the extent that any cross-examination – direct or indirect – may have been aimed at Ms. Magas' credibility, such cross-examination was without effect and in no way diminishes what I accept was Ms. Magas' honest attempt to relate

to the court the October 31, 2008 conversation - however inaccurately or inadequately she may have recalled, interpreted and understood it.

Penny Piper

[75] This witness testified as a lawyer with Justice Canada's Tax Litigation Section. In 2008, she was on a one-year secondment with the Public Prosecution Service of Canada. It was in that context, as a relatively junior lawyer, that she was assigned in May 2008 the conduct of the judicial interim release application for Isaac Chartrand.

[76] Ms. Piper testified that based upon her reading of the arrest report, the criminal record and the police narrative, she spoke on behalf of the Crown in opposition to Chartrand's release. Ms. Piper does not believe she had any conversation with defence counsel before the bail. Neither does she believe that she would have conveyed any of the facts asserted at the bail (either by the defence or the Crown) to anyone else in her office. It was her view that the matters raised at the bail, both by the Crown and the defence, were matters of a factual nature that would have to be left for an adjudication at trial. At no point did she have any discussions with Ms. Magas.

[77] It would seem that Ms. Piper's evidence was adduced by the Crown for the purposes of confirming that even at this early "bail stage", reliance was placed (at least by the Crown) on the disclosure package (the criminal record, narrative, report and notes) provided to the lawyers.

[78] It should be noted that as well, in cross-examination, Ms. Piper acknowledged that after reading documents in the disclosure package, she concluded that the disturbance in the backyard involved something on the order of the officers having heard some loud noises. Ms. Piper acknowledged saying at the bail hearing that the officers saw a shoving match and approached to tell the individuals to keep it down. She testified that that submission was based upon her interpretation of what was being conveyed in the police narrative. In this regard, in addition to using her evidence to establish that reliance was placed upon these documents by the Crown, I accept that her testimony can also be used in a limited way to establish the fact of another possible interpretation (a different interpretation from that of Magas) of the same reports.

[79] Notwithstanding what were various references made by the defence to aspects of the bail application, it is my view that most of what occurred at the bail hearing is hearsay and apart from what was otherwise stipulated and acknowledged in the previous paragraph, it is of marginal probative value respecting the issues that the court must determine.

Sergeant Cheryl Larsen

[80] Sergeant Larsen is currently the head of the Robbery Homicide Unit with the Winnipeg Police Service. Prior to holding that position, she was head of the Professional Standards Unit. It was in the context of that position that she became involved in the internal investigation respecting Constables Beattie and Clark.

[81] As background, Sergeant Larsen confirmed that from her experience as a City of Winnipeg police officer, it is understood that police narratives, arrest reports and individual notes are meant to provide an accurate account of those incidents which police officers are required to attend. It is also understood that the disclosure of same will be relied upon by both Crown and defence counsel.

[82] In relation to her internal investigation into the allegations respecting Constables Beattie and Clark, Sergeant Larsen provided evidence respecting that information that she would have gathered and/or reviewed. Sergeant Larsen testified that she would have reviewed in detail the entirety of the police reports including the narrative, the arrest report and the individual notes as prepared by each officer. Sergeant Larsen also testified that her investigation would have involved the review of information coming from the Federal prosecutor, Erin Magas. That information would have come from Ms. Magas' original memorandum, and Sergeant Larsen's eventual discussions with Ms. Magas which ultimately formed the basis of Magas' two statements.

[83] Sergeant Larsen testified that based on the discussions with Ms. Magas and the "taped" version of events as given by Magas, she (Sergeant Larsen) was left with the impression that there were two different scenarios being described by Magas. One version was constituted by what Magas referred to as what "they" did (Constables Beattie and Clark) and the other scenario was constituted by what Constable Beattie himself did. Part of the "they did" scenario would seem to have resulted from Ms. Magas' somewhat careless use of the pronoun

when describing relevant events. The resulting, differing and sometimes confusing information which Sergeant Larsen said she was provided by Magas, led to her (Sergeant Larsen's) trial testimony wherein she stated that the following was her (Sergeant Larsen's) understanding of the events:

- They both went into the house;
- Magas' understanding that Constable Beattie arrested Isaac Chartrand;
- Both go into the house, Constable Beattie is the one who located Chartrand;
- Constable Beattie told Magas that they both escorted Chartrand out;
- Both walked across the yard;
- Both located the dropped object;
- Then they knew it was cocaine.

[84] The above and somewhat confused understanding by Sergeant Larsen (based upon the versions discerned from Magas) underscores and is illustrative of Magas' uncertain recollection and her sometimes vague and imprecise account of how she herself (Magas) interpreted what happened on May 5, 2008, perhaps such so as to have concluded that the officers knowingly and complicitly prepared false reports.

[85] During the course of her testimony, Sergeant Larsen was asked in cross-examination to read portions of Constable Beattie's notes. The resulting difficulty and Sergeant Larsen's confusion and general inability to accurately discern or apprehend what Constable Beattie was describing, caused Sergeant

Larsen to agree that it is difficult to determine consistency or inconsistency with respect to what Magas said she heard in the interview room when compared to the contents of the notebooks. Indeed, Sergeant Larsen conceded that she was only able to read parts of the notes then (at the time of the investigation) and now. Sergeant Larsen had earlier acknowledged as well, that individual police notebooks are often "quite different". Ultimately, based on and acknowledged in Sergeant Larsen's testimony, counsel for the defence reasonably suggest that given the difficulty Sergeant Larsen had in discerning what the notes said, even if the notes can be identified as being somewhat different, it is difficult to tell the extent to which they are inconsistent, never mind false.

Constable Paul Clark

[86] Constable Clark testified that as of May 5, 2008, he had been a police officer for three years and had been working with his partner, Constable Beattie, in general patrol for approximately one year. Commensurate with his relatively junior status as a police officer, Constable Clark explained that as of October 31, 2008, he had never testified in court. Indeed, the testimony that he provided at this, his own trial, was the first time he had ever testified in criminal court.

[87] As with Constable Beattie, Constable Clark gave evidence which would explain the nature of the district in which he worked. In that regard, he explained that the "North End" is plagued by drug dealing and gang violence. Constable Clark explained how police practices in districts like the North End involve, by necessity, community intervention and the use of street intelligence.

In this regard, he explained that there is a "white board" at the District 3 police station that is used as a repository of local police intelligence. The beginning of each shift often involves consultation and explanatory discussion of information appearing on that white board.

[88] On May 5, 2008, Constable Clark began his shift at 7:00 a.m. Constable Clark explained that for the first half of that day he was the driver of the patrol car and his partner, Constable Beattie, was the passenger and computer operator. Constable Clark testified that it was shortly after 11:00 a.m. that he and Constable Beattie encountered an individual who was described as a "tipster". After some initial background checks of the individual, Constable Clark asked the person (who obviously remained unidentified and anonymous at trial) what he/she recently heard with respect to the pushing or selling of crack cocaine. It was at that time that the individual told the officers that someone by the name of "Isaac" was pushing drugs out of 618 Redwood. Constable Clark explained that based upon what he and his partner already knew about 618 Redwood, this information did not come as a surprise. Nonetheless, as part of the standard procedure, Constable Beattie "ran" the address at 618 Redwood in the patrol car computer. The computer indicated (under the list of residents or occupants for that address) that "Isaac Chartrand" was a resident.

[89] Constable Clark testified that nothing further was immediately done with that information obtained from the tipster. Constable Clark explained that it was not until approximately 4:30 that afternoon (nearer to the end of their shift) that

he suggested that he and Constable Beattie drive down the back lane of Redwood as part of routine patrol "intelligence gathering" in an area identified as requiring (in light of information received) attention.

[90] Constable Clark described how, when the cruiser car drove down the back lane, he (Clark) heard yelling coming from one of the backyards. He was able to see in the gap between the garage and an unidentified obstruction, "a bunch of males" shoving each other back and forth. After Constable Clark confirmed with Constable Beattie that he had seen the same thing, the car was stopped a couple of houses past the backyard in question. Constables Clark and Beattie proceeded to walk towards the gap between the obstruction and the garage. They entered the backyard, they saw four males who, according to Constable Clark, were seated either on lawn chairs or on the edge of a picnic table. It was at that point that Constable Clark testified that he asked them something to the effect "Hey guys, what's going on?"

[91] Constable Clark testified that one of the males proceeded to get up out of his chair and began running towards the house. Constable Clark testified that as he did so, a clear plastic bag (filled with tin foil wrapped pieces) fell from the leg of his shorts. This was confirmed in Constable Clark's notebook.

[92] Constable Clark described how Constable Beattie proceeded to give chase while he began focusing on the three remaining males.

[93] In his testimony, Constable Clark indicated that he did not see Constable Beattie pick up the bag which he believed contained crack cocaine. Constable

Clark specified that at this point in time, he would have been paying attention to the three males with whom he was left. His focus would not have been on Constable Beattie or the bag of cocaine.

[94] While Constable Clark was obtaining background information with respect to the three remaining individuals outside the house, he noted that Constable Beattie was exiting the house with a handcuffed male who he recognized as Isaac Chartrand. Constable Clark stated that he was certain that this was the same male who ran into the house. At the same time, Constable Clark noticed that Constable Beattie was holding a larger bag of crack cocaine and he heard Constable Beattie say "He has more crack." This too was noted in Constable Clark's notebook. Constable Clark further testified that it was at this same time that he noted Constable Beattie picking up a bag from the ground. Constable Clark specified that he is not certain whether that was the bag originally observed to fall from the individual running into the house, nor does he know what happened to that originally observed bag. Constable Clark acknowledged that he had no reason to believe that the bag that Constable Beattie was picking up at that point (after Constable Beattie and Chartrand had exited the house) was not the same bag as had previously fallen from Isaac Chartrand.

[95] Later, when Constable Clark was with Chartrand in the cruiser car and doing some background checks on all of the individuals found at 618 Redwood, he (Constable Clark) recorded an exculpatory statement made by Chartrand which suggested that "that shit ain't mine man". In the context of that remark

by Chartrand, he was identifying a Mr. Laporte, one of the individuals found at the scene. That information was communicated to Constable Beattie who then proceeded to arrest Laporte.

[96] Constable Clark stipulated in his testimony that when he and Constable Beattie stopped in the back lane, he was not aware that the backyard they were entering was attached to 618 Redwood, nor did he know that the male chased into the house (and later brought out by Constable Beattie) was Isaac Chartrand.

[97] Constable Clark stated clearly that his notes were prepared at the scene or shortly thereafter and that they were truthful and represent his honest recollection of what he saw and heard.

[98] Constable Clark testified that after having received a subpoena, but several weeks before the preliminary inquiry, he reviewed his notes and the police narrative. It was at that time that he noticed some issues which he raised with Constable Beattie. The first of those issues related to the mug shot picture of Isaac Chartrand which showed him wearing a light-coloured shirt. Constable Clark remembered that when he ran into the house at 618 Redwood, Chartrand was wearing a dark shirt. Second, Constable Clark noticed that Constable Beattie had written in his narrative that he (Constable Beattie) picked up the drugs as he went into the house. At this point, Constable Clark testified that he did not recall having seen Constable Beattie pick up the drugs, nor did his (Constable Clark's) notes indicate that Constable Beattie picked up the drugs before going into the house. Constable Clark also acknowledges, however, that

his notes make no mention of having seen a bag of crack cocaine after Constable Beattie and Isaac Chartrand came out of the house.

[99] Constable Clark testified that when he spoke to Constable Beattie, Constable Beattie explained that he was confident that he did in fact pick up the drugs before going into the house. They discussed the fact that there was a video camera at the scene and that it might perhaps offer clarification. As a result of Constable Clark's review of his notes and the subsequent conversation with Constable Beattie, Constable Clark explained to the court that it was decided, pursuant to general advice previously received from their Sergeant, that these two junior officers speak to the Crown on the day of the preliminary inquiry so as to raise the two points that Constable Clark had discussed with Constable Beattie.

[100] On the morning of October 31, 2008, Constables Clark and Beattie arrived at the Law Courts in their cruiser car around 9:29 a.m. Constable Clark was feeling somewhat nervous as he had never testified before. He was nonetheless looking forward to the experience. Constable Clark testified that Constable Beattie had gone into the courtroom to inform the Crown that they were present for the Chartrand matter and when Constable Beattie exited the courtroom, he told Constable Clark that he had overheard a conversation between the Crown and Chartrand's lawyer. Constable Beattie explained to Constable Clark that he heard Magas say to the defence counsel "You wanna' take a run at my guys?" to which the defence counsel responded "Yeah."

[101] This was to be Constable Clark's first encounter with the Federal prosecutor, Erin Magas. Constable Clark testified that when he first saw Ms. Magas come out of the interview room with several other officers that he knew, she appeared to be rushed, frustrated and annoyed. It was then that the group of four officers who had been speaking to Magas walked by Constables Clark and Beattie, at which point one of them said somewhat sarcastically "Good luck." Constable Clark testified that he interpreted this to mean that Magas was perhaps not "necessarily in the best of moods."

[102] Ms. Magas then approached Constables Clark and Beattie, with Constable Beattie asking her if they could speak to her. Ms. Magas indicated that she was currently dealing with other matters, but would be back briefly to talk to them.

[103] Constable Clark testified that it was several minutes later when Ms. Magas returned and took them into an interview room. There, Constable Clark sat down while Ms. Magas opened up a folder and said "I don't know what the issue is. This seems like a simple case." Constable Clark testified that it was then that Constable Beattie explained that their sergeants had always told them that if they have questions they should raise them with the Crown. Ms. Magas stated "What are your questions?" Constable Beattie asked if there was a video. Magas said that the defence has no obligation to disclose a video and she asked "If there was a video, what would it show?"

[104] Constable Clark testified that it was then that Constable Beattie first raised the issue of a different coloured shirt and said something to the effect that "As

we enter the yard, the male gets up and runs to the house and in so doing, a baggie of crack falls from his shorts and I picked it up before I went in, but that my partner doesn't see me picking it up until I come out."

[105] While Constable Clark acknowledges that he is unable to recount the conversation verbatim, he does indicate clearly that there was no discussion of "known drug dealers" while in the interview room with Ms. Magas. Moreover, Constable Clark testified that while the subject of a fight may have been raised, he does not recall it being discussed.

[106] According to Constable Clark's testimony, Ms. Magas closed her folder saying that she would stay the charges based on the information that she had now been given and if they were on the stand, they would be giving perjured evidence and that their careers were not worth \$6,000.00 of crack. Ms. Magas then opened up her folder and asked who their Sergeant was. Constable Beattie gave her a name which Ms. Magas appeared to note.

[107] It is Constable Clark's testimony that Ms. Magas' demeanour during their encounter in the interview room was rushed and curt. According to Constable Clark, Magas appeared to be angry. For his part, Constable Clark testified that he felt intimidated by her. At the end of the brief meeting and as they walked out of the interview room, Constable Clark testified that he felt "shocked and numb". Neither he nor Constable Beattie said anything to each other.

[108] In cross-examination, Constable Clark persuasively denied that he had fabricated the idea that there was “pushing, shoving or yelling” in the yard in question.

[109] Constable Clark also specifically denied in cross-examination that Magas had, while in the interview room, posed the question “Did somebody pick up the baggie?”

[110] When challenged in cross-examination about his apparent silence and failure to protest in light of Magas’ decision to stay proceedings, Constable Clark explained plausibly, that while he was not happy with the decision, he was not aware of a process whereby he could “file a protest”. In respect of this portion of the cross-examination, I note his earlier testimony in direct examination where Constable Clark explained that he felt intimidated by Ms. Magas and how, following this encounter with her, he decided that he would never again remain silent while someone, regardless of their rank in society, spoke to him in the way that he believed Magas was speaking to he and Constable Beattie that morning.

Constable Graeme Beattie

[111] Constable Beattie testified that as of October 31, 2008, he had only testified in court once before (very briefly) on a very minor breach offence. As of May 5, 2008, he had been with the Winnipeg Police Service for only 1½ years.

[112] Respecting May 5, 2008, Constable Beattie gave evidence to the effect that as Constable Clark drove the cruiser car down the back lane, he (Beattie) heard a commotion coming from one of the backyards. Constable Beattie

described it as "loud noises and yelling". It was as a result of that commotion and noise that Constable Clark parked the cruiser car. Both Constables Clark and Beattie exited the car and walked towards the backyard from where they heard the disturbance.

[113] Constable Beattie testified that as he entered the backyard, he noted three young males seated in lawn chairs. The male closest to the house then proceeded to run towards the residence. At that particular point, Constable Beattie was unable to see his face and accordingly was unable to identify that male by name. Unlike the testimony given by Ms. Magas, Constable Beattie testified that at no point in time did he see the young males in the backyard "scatter".

[114] Constable Beattie testified that when he began to pursue the male who ran towards the residence, he noted that a small bag fell from his shorts. According to Constable Beattie's testimony, he (Beattie) picked it up and saw that it was a bag containing tin foil wrapped pieces. Constable Beattie testified that he believed that bag to contain crack cocaine. Indeed, Constable Beattie made a note to that effect in his notebook. Constable Beattie indicated that after he picked up the plastic bag, he continued to give chase to the young male which required him to enter the house. When Constable Beattie entered the house, he noted that the male he had been chasing ran from the right to the left in the kitchen area.

[115] Constable Beattie testified that by the time he got into the house, the male that he was pursuing was no longer wearing a dark coloured shirt. He was by this time wearing a greyish-white shirt. It was at that point that Constable Beattie indicated that he grabbed the male by the collar and arrested him for possession of drugs. The colour of the shirt that was being worn by that male was indeed the same colour of the shirt in the profile mug shot of Chartrand (Exhibit 6). Constable Beattie was certain that the person he pursued into the house was in fact Chartrand (a 5 ft. 8 in. male who at 150 pounds was rather skinny) and not Mr. Laporte whose height and build was very different from that of Chartrand.

[116] Constable Beattie testified, as did Constable Clark, that it is quite common amongst the drug sub-culture in circumstances like those described, for suspects to change shirts in order to avoid police detection. Constable Beattie reaffirmed that "without a doubt" the male that he arrested inside the house (Isaac Chartrand) was the same male he chased from the backyard.

[117] Upon apprehending Chartrand inside the house, he searched him and found, in the waist band area of Chartrand's shorts, seven additional bags of crack cocaine.

[118] When Constable Beattie exited the residence with Chartrand, he said to Constable Clark that he had found "additional crack". This comment is confirmed in Constable Clark's notes.

[119] Constable Beattie specifically mentioned in his testimony that everything he recorded in his notes and the police narrative are, to the best of his knowledge, accurate and in no way false. Constable Beattie similarly confirmed that there was no effort to collaborate with Constable Clark in the writing of either his notes or narrative.

[120] Constable Beattie explained in his testimony that a few weeks prior to the preliminary inquiry date, he had a conversation with Constable Clark wherein Clark explained that he reviewed Constable Beattie's narrative and he noticed the two earlier identified issues. Constable Beattie explained in his testimony that in light of those two issues and given that his Sergeant had previously told him that if there was ever an issue in respect of one of his cases he should speak to the Crown prior to court, he and Constable Clark decided to do just that.

[121] On the day of Chartrand's preliminary inquiry, October 31, 2008, Constable Beattie testified that he and Constable Clark arrived in a police cruiser car. After having parked the vehicle and entered the Law Courts Building, Constable Beattie entered Courtroom 409 while Constable Clark waited outside. In Courtroom 409, Constable Beattie found the Crown prosecutor, Ms. Magas, who at the time was talking to another male. That male turned out to be counsel for Mr. Chartrand, to whom Constable Beattie heard Ms. Magas say, "Do you want a run at those two officers?" Constable Beattie understood that to be a reference to he and Constable Clark. After having advised Ms. Magas that he

and Constable Clark wished to speak to her before court, Ms. Magas advised Constable Beattie that she would join them outside the court shortly.

[122] According to the testimony of Constable Beattie, it was approximately 15 minutes later when Ms. Magas approached he and Constable Clark and proceeded with them into an interview room very close to the courtroom. Inside the interview room, during the ensuing conversation with Ms. Magas, Constable Beattie confirmed that it was he (and not Constable Clark) who did most of the talking. Respecting the short conversation that then took place in the interview room, Constable Beattie described Ms. Magas' manner as seeming to be rushed, "curt and short". Constable Beattie described himself as feeling intimidated by her and further noted that he had the feeling she was "talking down" to them.

[123] The conversation began with Constable Beattie explaining that their Sergeant had always told them that if they had questions, they should approach the Crown. Ms. Magas acknowledged that assertion with "okay". Constable Beattie then asked Ms. Magas if there was a video disclosed by the defence. Constable Beattie explained in his testimony that although he had now been apprised to the contrary, as of October 31, 2008 he believed that the defence had an obligation to disclose evidence to the Crown.

[124] In response to Constable Beattie's question about the video, Ms. Magas asked Constable Beattie "If there was a video, what would it show?" Constable Beattie responded by saying that it would show a black shirt on the male as he ran into the house, but a white shirt on him as he came out. According to

Constable Beattie, Ms. Magas did not seem concerned by this issue. Ms. Magas then asked "Was there actually a fight?" Constable Beattie testified that he replied that there was not a fight. By way of explanation, Constable Beattie told the court that in his mind, a "fight" involved punching and kicking. During this conversation in the interview room, Ms. Magas did not ask Constable Beattie for any clarification or elaboration as to what Constable Beattie considered or characterized "a fight". Indeed, according to Constable Beattie's testimony (and contrary to the evidence of Ms. Magas), during the brief encounter with Ms. Magas in the interview room, Ms. Magas never "went through the reports in detail", nor did she make notes of her own respecting what she was saying and what she was being told in the interview room.

[125] Following up on Constable Beattie's earlier answer to her, Ms. Magas then asked what else the video would show. Constable Beattie explained in his testimony that he told Ms. Magas "I picked up a bag of drugs going into the house. However, I may have picked up a bag of drugs coming out of the house." When asked to further explain himself, he stated that it was because of the conversation that he had had with Constable Clark in preparing for the preliminary inquiry (wherein Constable Clark explained to Constable Beattie that he thought that Constable Beattie had picked up the bag of drugs as he exited the house), that he was now raising the matter with Ms. Magas. As Constable Beattie continued to believe he had picked up the bag before entering, "Paul" (Constable Clark) hoped the video might clarify the issue. Constable Beattie

made it clear in his testimony that he was not "concerned" about the video and in fact was hoping that it would clarify "in Paul's mind" what had happened.

[126] In his testimony, Constable Beattie acknowledged that in looking back on the conversation with Ms. Magas in the interview room, he probably did not provide the kind of clear explanation that he should have and that, in fact, his explanation of the issues which he and Constable Clark had discussed (in preparing for the preliminary inquiry) was "very poor". In that regard, he stated in his testimony that "If I would have made my point, I wouldn't be sitting here today".

[127] Notwithstanding whatever lack of clarity or poor explanation he acknowledged in his conversation with Ms. Magas on October 31, 2008, Constable Beattie was clear in his insistence that on May 5, 2008, he knows that he "picked up the drugs going into the house".

[128] During his evidence, Constable Beattie clarified that at no point did he ever say "the four males scattered". Nor did he ever refer to the individuals in the backyard as "four known drug dealers". Constable Beattie explained that when he arrived at the backyard in question, he did not know who the individuals at that location were.

[129] In response to a suggestion coming from the earlier testimony of Ms. Magas (wherein she stated that "neither officer picked up the cocaine or looked at it to know that it was cocaine"), Constable Beattie testified that at no point in

the interview did Ms. Magas ever ask "Did you pick up the cocaine before you went into the house?"

[130] Ms. Magas advised Constables Beattie and Clark that she would be staying the proceedings. She requested of Constable Beattie the name of his Sergeant, whose name (Rick Lange) Constable Beattie provided. Constable Beattie observed Ms. Magas to make a note on her file. At this concluding portion of the conversation, Ms. Magas advised Constables Beattie and Clark that if she were to put them on the stand, they would be providing perjured evidence. She made a reference to other officers who were currently charged with perjury.

[131] In connection to the above comments by Ms. Magas, Constable Beattie testified that at no time did he say anything to Ms. Magas that would have affirmed or endorsed Ms. Magas' suggestion that had he testified on the basis of what he said on October 31, 2008 or on the basis of his notes and/or reports, he would have been giving perjured evidence at the preliminary inquiry.

[132] While earlier in his testimony he accepted that his explanation of the issue to Ms. Magas may have been poor, Constable Beattie was nonetheless clear in his evidence that at no point did he intend to, nor did he ever acknowledge or confirm that he did not pick up the cocaine before going into the house in pursuit of Chartrand.

[133] Constable Beattie stated clearly in his testimony that nothing in his narrative or notes is false, and nothing in that narrative or his notes was created with the intention of obstructing justice.

[134] In an explanation not dissimilar from that of Constable Clark, Constable Beattie explained that once Ms. Magas decided to stay proceedings, he had no idea how to “protest” that Crown decision. Further, he felt that it was a decision that fell within her domain as a prosecutor.

[135] When I examine Constable Beattie’s testimony and his responses in cross-examination, I note that in many ways he gave evidence like the nervous, inexperienced and somewhat inarticulate officer that he is. Nevertheless, despite a vigorous cross-examination, Constable Beattie was not particularly shaken or contradicted. For example, when it was suggested to him by the Crown that he in fact “wanted to get inside” the residence at 618 Redwood, his response was an abject denial, saying that he and his partner simply drove down the back lane with the intention of “checking out” the residence about which they had received information in the ordinary course. Similarly, in respect of his definition of “fighting”, he asserted plausibly that “pushing and shoving” is not in his consideration a fight, but may in fact, in legal terms, fall under the definition of assault. Finally, when challenged as to why he did not protest the decision of Ms. Magas with which he obviously would not have been in agreement, Constable Beattie repeated that he was unfamiliar with any procedure that would have permitted him to complain about the Crown prosecutor or her decision.

Detective Sergeant Jeffrey Stalker

[136] Detective Sergeant Stalker gave testimony in relation to his role as the designated drug expert in the case of R. v. Keesick which was scheduled to

proceed to preliminary inquiry on the same morning as R. v. Chartrand. It was on the morning of October 31, 2008, in the context of his role as the subpoenaed drug expert, that Detective Sergeant Stalker would have had occasion to interact with Ms. Magas, the Federal Crown.

[137] Detective Sergeant Stalker is now an investigator with the Robbery Homicide Unit of the Winnipeg Police Service. As of October 31, 2008, he was already a relatively senior officer with approximately 12 years of experience. He had already testified in court somewhere between 30 and 60 times.

[138] Detective Sergeant Stalker related for the court the difficulties that existed in the case of R. v. Keesick (on the morning of October 31, 2008) concerning the unavailability of the exhibits. That problem resulted in Detective Sergeant Stalker being obliged to inform Ms. Magas that he could no longer provide an opinion that the facts in the Keesick matter were consistent with the "possession" being for the purposes of trafficking. According to Detective Sergeant Stalker, Ms. Magas' reaction to this turn of events was one of "upset" and "obvious disappointment".

[139] Detective Sergeant Stalker had earlier described how on the morning in question, Detective Sergeant Stalker noticed Ms. Magas to be unusually abrupt and "visibly upset", omitting such opening pleasantries as "Hi Jeff". During the ensuing brief conversation, her demeanour did not improve.

[140] Detective Sergeant Stalker testified that it was his view that Ms. Magas was upset with him about what happened to the evidence and his change of

opinion respecting whether this was possession for the purpose of trafficking. It was also Detective Sergeant Stalker's view that the interaction he was having with Ms. Magas was "not professional" and not at the level of his past dealings with Federal Crown prosecutors.

[141] Detective Sergeant Stalker indicated in his evidence that he felt Ms. Magas was "intimidating" and that the situation itself was "intimidating". Notwithstanding his stated experience, Detective Sergeant Stalker testified that despite the nature of his interaction with Ms. Magas on the morning of October 31, 2008, he did not complain or protest about her manner or her ultimate decision, saying that he "wouldn't know what to say" and it was not "his place to push back". Based on his understanding, it is the Crown that has the last word on whether a case goes ahead and he did not believe it was his place to complain about her demeanour or decision-making.

VI. ANALYSIS

[142] For the court to find Constable Beattie and Constable Clark guilty of "attempt to obstruct justice" as charged, the Crown must establish beyond a reasonable doubt the conduct alleged (knowingly making the false reports and notes), further that such conduct had a tendency to obstruct, pervert or defeat the course of justice and finally, that it was the intention of Constables Beattie and Clark to obstruct, pervert or defeat the course of justice.

[143] Corresponding to the above essential elements, I had earlier set out at paragraph 9 three questions which identified the issues requiring my analysis:

- (1) Did the accused knowingly prepare "false notes" and "false police reports"?
- (2) If the accused did knowingly prepare "false notes" and "false police reports", does such conduct have a tendency to obstruct, pervert or defeat the course of justice?
- (3) Did the accused intend to obstruct, pervert or defeat the course of justice?

[144] For the reasons that follow, given that all three questions must be answered in the affirmative if a conviction is to be entered, my analysis in this case need not go beyond the first question. Simply put, I am unable to conclude that the Crown has established beyond a reasonable doubt that Constables Beattie and Clark knowingly prepared false notes and false police reports.

[145] Although it will be unnecessary to proceed to the second and third questions, I will note that had I determined that Constables Beattie and Clark prepared false notes and false police reports, given the context in which those notes and reports were prepared (by two police officers) and eventually provided to Crown and defence counsel (for their consideration, reliance and decision-making), I would have had no difficulty in finding beyond a reasonable doubt that such conduct had "a tendency to obstruct, pervert or defeat the course of justice". See **R. v. Graham** (1985), 20 C.C.C. (3d) 210 (Ont. C.A.). Such conduct cannot but be seen as interrupting, making more difficult, getting in the way of, impeding and/or hindering the course of justice.

[146] Had I determined that Constables Beattie and Clark had falsified their notes and reports, I would have similarly had no difficulty in inferring that such conduct was intended to obstruct, pervert or defeat the course of justice. In this regard, given the obvious and well-known roles played by a police officer in the administration of justice, and given the nature of the alleged conduct, had there been a falsification of the notes and reports, I would have without hesitation invoked the general rule that a person who foresees that a consequence is certain or substantially certain to result from an act, is someone who can usually be seen as intending that consequence. More specifically, it would have been a reasonable inference to draw that two police officers preparing false notes and reports (knowing such notes are a part of the police disclosure package in the case of any prosecution), would have been able to foresee that it was substantially certain that such conduct was going to obstruct, pervert or defeat the course of justice.

[147] Notwithstanding my above comments as to how I would have answered, if necessary, the second and third questions, what follows is my analysis of the first question, the answer to which is fatal to the Crown case.

Issue 1 - Did the accused knowingly prepare "false notes" and "false police reports"?

[148] There can be no question but that the case for the Crown depends overwhelmingly on the evidence provided by Ms. Magas respecting what she remembers and understood about the extremely brief conversation she had with Constables Beattie and Clark the morning of the preliminary inquiry on October

31, 2008. It is from Ms. Magas' testimony respecting that approximately one to 1½-minute conversation, that the court must find that Constables Beattie and Clark communicated certain things which the Crown suggests constitute, for all intents and purposes, admissions that they prepared false notes and false police reports.

[149] It should be remembered that Ms. Magas identified two discrepancies or inconsistencies between that which Constables Beattie and Clark communicated to her in the October 31, 2008 conversation and that which they recorded in their notes and reports:

- (1) whether there was in fact a fight;
- (2) whether the bag of crack cocaine was picked up by Constable Beattie before he went into the house in his chase of Chartrand.

[150] Having observed and heard her testimony at trial, unlike counsel for Constable Beattie, I have no concern whatsoever about Ms. Magas' credibility. That is, there is no doubt in my mind that Ms. Magas attempted to give her evidence as honestly and as accurately as she could. Moreover, it is my conclusion that she truly believed that the evidence she was giving was honest and accurate. Notwithstanding that honestly intentioned testimony, there are nonetheless factors present in this case that affect the reliability of Ms. Magas' recollections, impressions, interpretations and understandings as to what Constables Beattie and Clark told her on October 31, 2008 respecting what they did on and subsequent to May 5, 2008.

[151] The distinction between concerns as to credibility and reliability is well recognized. See **R. v. C.L.Y.**, 2008 SCC 2, [2008] 1 S.C.R. 5. It is obvious that concerns with either credibility or reliability and/or both, can and often will affect the extent to which a finder of fact can depend on a witness to find facts in support of one position or another. It should be no less obvious that however subtle the distinction between the two concepts may be, it is sometimes possible and even necessary to determine that a witness' testimony is credible but insufficiently reliable.

[152] The distinction between credibility and reliability was discussed by Doherty J.A. at para. 33 in **R. v. Morrissey** (1995), 22 O.R. (3d) 514 (Ont. C.A.), [1995] O.J. No. 639 (QL):

33. Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. In this case, both the credibility of the complainants and the reliability of their evidence were attacked on cross-examination.

(emphasis added)

[153] As it relates to the reliability of Ms. Magas' testimony in the present case, I accept as valid and persuasive the various concerns raised by the defence. Although each of the two defence counsel representing Constables Beattie and Clark respectively, presented their own reliability concerns in their own way,

there is obvious common ground. What follows is a discussion of those points or factors of concern which, in my view, limit the extent to which I can rely on Ms. Magas' testimony.

[154] First, I agree with the defence that parts of Ms. Magas' recollection "were contradicted by immutable facts and other evidence". In this regard, I note that Ms. Magas' evidence was contradicted in respect of what she stated she initially told the presiding Provincial Court judge about the Keesick matter; in respect of when Ms. Magas finished dealing with the police officers on the Keesick matter; in respect of what she said on the record about the stay of proceedings; in respect of whether Ms. Magas had a pen during her discussion (in the interview room) with Constables Beattie and Clark; and in respect of whether Ms. Magas made a note on file.

[155] The second concern as to Ms. Magas' reliability is connected to her failure to make any contemporaneous notes during the critical but very brief conversation in question. She made no notes notwithstanding the fact that according to both Constable Beattie and Constable Clark, there was both a pen and paper present. The first notes that she made would have been approximately 1½ hours later when she prepared her memorandum at the direction of her supervisor, Mr. Ian Mahon.

[156] Based on Ms. Magas' testimony in court and her obviously extensive reliance upon her memorandum of October 31, 2008, it is not clear to what extent she has an independent recollection of the events about which she

testified. In other words, her *viva voce* evidence is only as reliable as the ability to have accurately recorded in her memorandum her impressions and interpretations of that which she saw and heard when speaking to Constables Beattie and Clark.

[157] Concerning the memorandum which is critical to Ms. Magas' recollection and which constitutes her only real record (prior to her eventually speaking to Sergeant Larsen) of the conversation that took place between she and the two officers, the obvious should be noted – the memorandum does not represent a verbatim record of the questions posed or answers given. Indeed, she acknowledged that "there could be other details" which may not have been included in her memorandum. In the end, Ms. Magas concedes that the memorandum was a "summary" of those matters that she considered important.

[158] With the exception of one question ("Was there a fight?") Ms. Magas' memorandum does not reproduce the questions that she (Magas) asked of the officers in the interview room. I agree with the position of defence counsel when they submit that in order to best understand the nature of an answer, one must often consider the question in response to which the answer was given. It is interesting and given the significance of the question, concerning to note that Ms. Magas' memorandum omits what is arguably the most critical question asked in the interview room: "Did you pick up the drugs on your way into the house?" Again, I agree with counsel for the defence that that question, in the context of any response, does constitute one of the foundations of the Crown case.

[159] The third concern respecting Ms. Magas' reliability in relation to her recollection and understanding of what it was she saw and heard on October 31, 2008, flows from what I find was her upset, frustrated and rushed state. Based upon the evidence that I heard and accept, Ms. Magas was indeed angry and frustrated over the Keesick matter and in my view, it did in fact impact negatively on her understanding of what she was being told by Constable Beattie. Her frustration, which began with her conversations with the officers in the Keesick matter, grew based on her understanding and interpretation of what Constables Beattie and Clark were saying.

[160] Apart from her state of upset and frustration, Ms. Magas was also interacting with Constables Beattie and Clark at a point in time when she would have felt rushed. In that regard, I note she was running late vis-à-vis the "brief recess" she initially requested of the presiding Provincial Court judge. The court had initially opened that day around 10:00 a.m. with a brief opening appearance and by the time it resumed, it was 10:30 a.m. In addition to what Constables Beattie and Clark and Sergeant Stalker confirmed was her rushed manner, Ms. Magas herself acknowledged that she had "one eye on the clock".

[161] In short, the reality of that very brief conversation on the morning of October 31, 2008 is that it involved a rushed and frustrated prosecutor who did not make contemporaneous notes and who thus, not surprisingly, was unable to provide a verbatim recollection of the conversation in question for her memorandum. Indeed, the memorandum she wrote was a summary of her

general impressions. That reality impacts not only the reliability of Ms. Magas' testimony, but it also provides a relevant reference point as to why she may have misunderstood and misapprehended what it was she was being told by Constable Beattie. In that regard, it is instructive to examine the two subjects about which Ms. Magas identified discrepancies as between the conversation and the reports: whether there was a fight and whether the bag of crack cocaine was picked up by Constable Beattie before he went into the house.

[162] The first indication that Ms. Magas said she had that the notes and/or reports were false was with respect to the "fight". Ms. Magas stated that when she asked the officers whether there was a fight and (according to Magas) they said no, she interpreted that as a discrepancy. That interpretation came without further inquiry (by Magas) of the officers as to what more precisely they recalled and how that compared with what was contained in their notes and/or report. Importantly, Ms. Magas stated that she drew no distinction between fighting, shoving, pushing or a disturbance. While that may have been Ms. Magas' view, the defence is correct when they argue that the real question was whether the officers drew a distinction and how that might have manifested in what they recorded in their notes and reports and how they responded to her on October 31, 2008. Ms. Magas did not ask, nor did she attempt to clarify whether there was a fight at the time the officers drove by the backyard as compared to when they first entered the backyard. Clearly, she assumed that the supposed indication that there was "no fight" was in reference to when the officers drove

by the yard. The defence is correct to argue that Ms. Magas' assumptions have to be considered in light of what each of the officers thought was being discussed. In the case of Constable Clark, he indicated that a disturbance was going on that led him to conclude that they "appeared to be fighting" as indicated in his notes. He also confirms, however, that there were no blows being delivered and that when they walked back to the yard (after parking the patrol car), they did so because they were inquiring as to what was going on. Although Constable Clark does not recall specifically what either Constable Beattie or Ms. Magas said about a "fight" in the interview room before the preliminary inquiry, he certainly did not understand anything to have been said by Constable Beattie that would have been contrary to what was in his own (Constable Clark's) notes. For his part, Constable Beattie did not define the shoving or pushing in question as a fight, so when Ms. Magas asked him if there was a fight and he responded no, he believed he was giving an honest and correct answer. He also believed the answer was honest and correct in accordance with what he had recorded in his notes and narrative report. In short, I accept for the earlier stated reasons, that Ms. Magas may have misunderstood what was said and that neither Constable Beattie nor Constable Clark were making any sort of admission respecting a discrepancy, inconsistency or falsehood.

[163] According to Ms. Magas' testimony, the other indication that caused her to believe that the notes of the officers were false related to the question of

whether the bag containing the cocaine that was dropped by Chartrand in the yard, was picked up by Constable Beattie before he went into the house. On this subject, nowhere in Constable Clark's notes does he say that he saw Constable Beattie pick up this bag on his way into the house. Indeed, Constable Clark simply described seeing a clear plastic bag dropped on the ground by the male that was running towards the rear of the house. Constable Clark made it clear that he did not know whether Constable Beattie had picked up the bag before entering the house. What Constable Clark did know was that on that point, Constable Beattie's notes did indicate that he picked up the bag. Given that Constable Beattie remained convinced that he had picked up the bag before entering the residence (notwithstanding that Constable Clark himself did not see it or note it), it was hoped that if a video existed, it might offer a clarification. It was for that reason that the issue of the bag of cocaine and the video were raised and brought to the attention of the prosecutor, Ms. Magas. Based upon the evidence I rely upon and accept, the Crown has not established that there was anything said respecting the issue of the bag of cocaine by Constable Beattie or Constable Clark that was contrary to what was in the notes of either officer.

[164] I should also add that insofar as Ms. Magas in her testimony specifically observed that in the context of the discussions about the availability of a video (where in the interview room, according to Ms. Magas, the two officers at one point "started to look at each other" and seemed generally "fixated" with the

possibility of a video), I have considered carefully the utility and possible effect of such evidence. Based on what I explain below is the evidence of Constables Beattie and Clark that I accept, and the already discussed concerns with the reliability of Ms. Magas' interpretation and understanding of the conversation, those observations by Ms. Magas cannot be determinative.

[165] Having identified the areas of concern relating to the reliability of Ms. Magas' evidence and her understanding (or in this case, her misunderstanding) of what she was told in the interview room on October 31, 2008, I now turn to the testimony of Constable Beattie and Constable Clark. As earlier noted, that testimony must be assessed within the framework set out in ***R. v. W. (D.)***, *supra*. Accordingly, irrespective of my earlier assessment and related comments about the evidence of Ms. Magas, given the contents of their evidence, if I accept the testimony of Constables Beattie and Clark, I must acquit. Even if I do not accept their testimony, if I find that it raises a reasonable doubt, I must acquit. Finally, even if their evidence is not accepted and does not raise a reasonable doubt, I am left to return to an examination of the totality of the evidence (including and especially the evidence of Ms. Magas) to determine whether the Crown has established beyond a reasonable doubt that Constables Beattie and Clark knowingly prepared false notes and reports.

[166] I have already spent considerable time setting out the evidence of Constables Beattie and Clark. Without repeating that which I have already related, I will nonetheless underscore that apart from the many other details

provided to the best of their ability, I note that at no point did either Constable Beattie or Constable Clark agree with Ms. Magas' assertion that had they testified on October 31, 2008 on the basis of their notes, reports or otherwise, they would have given perjured evidence. Indeed, it would appear that as part of one of her misunderstandings, Ms. Magas misinterpreted Constable Beattie's acknowledgement that he was aware of the pending perjury case involving Winnipeg police officers, as being his agreement or confirmation that both he and Constable Clark would have been in a similar situation. It should be noted that Ms. Magas never testified that the officers admitted that their notes were false or that they had committed any wrongdoing. In fact, Ms. Magas throughout her testimony made reference only to inconsistencies. She further acknowledged in cross-examination, that inconsistencies in officers' notes are routine given the fast-moving events and different perspectives surrounding a police investigation.

[167] When I examine the testimony of both Constables Beattie and Clark, I note what counsel for the defence characterized as "candid and honest gaps in observational ability and memory". Neither Constable Beattie nor Constable Clark was evasive and they attempted to answer questions directly. To the extent that inconsistencies existed apart from those already discussed, those inconsistencies in testimony were minor in nature and were such that in this case, they support the suggestion that there was no attempt by Constables Beattie and Clark to fabricate a story or a completely "unified version of events".

[168] In reviewing the evidence of both Constables Beattie and Clark, their accounts of their day on May 5, 2008 stand as a response and refutation to the otherwise unsubstantiated Crown allegations of a police conspiracy. There is, in my view, nothing in the testimony of Constables Beattie or Clark that provides the Crown any basis for what was already an unsupported and speculative theory: that the police may have specifically targeted 618 Redwood or fabricated a disturbance at that address.

[169] In considering the direct and indirect suggestions of a police conspiracy which run as a continuing subtext in the Crown theory, like defence counsel for Constable Beattie, I find myself asking two questions which highlight the Crown's illogical position:

- (1) If Constable Clark prepared his notes in collaboration with Constable Beattie, why did he not note that Constable Beattie picked up the drugs on the way into the house?
- (2) If Constable Beattie prepared his notes in collaboration with Constable Clark, why did he not use the words "fight" or "fighting" in either his narrative or written notes?

[170] On a review of all of the evidence, the answer to the above two questions is as counsel for Constable Beattie suggests:

... The officers prepared their notes honestly and to the best of their ability. They saw matters from different perspectives and made no effort to correlate their respective notes and reports. Accordingly, what emerges is what would be expected (as confirmed by an experienced prosecutor like Ms. Magas): notes that are somewhat different but not materially inconsistent or false.

[171] In the final analysis, I accept the evidence of Constables Beattie and Clark that they did not falsify their notes and reports and I accept their evidence insofar as they deny saying anything to Ms. Magas on the morning of October 31, 2008 that would constitute an admission as to their having falsified their notes and reports.

[172] Even had I not accepted the evidence of Constables Beattie and Clark as to what they said was communicated to Ms. Magas in the interview room, their testimony as given, separately and together, would have raised a reasonable doubt.

[173] Finally, even had I discounted the evidence of Constables Beattie and Clark, when I examine their respective police reports and/or notes together with concerns I have identified respecting the reliability of Ms. Magas' recollection, interpretation and understanding of what she said occurred in the interview room, I would still have been left to conclude that the Crown has not established the guilt of Constable Beattie and Constable Clark beyond a reasonable doubt.

[174] As I earlier suggested, as a conscientious and skilled prosecutor, alert to the potential abuses of fabricated evidence, Ms. Magas' allegations as communicated in her memorandum, her statements to Sergeant Larsen and in her preliminary inquiry and trial testimony were, in my assessment, a good faith reaction to what she honestly believed and interpreted was conduct constituting an attempt to obstruct justice. Indeed, there are few professionals better placed than prosecutors like Ms. Magas to know the insidious implications for the

administration of justice were such conduct to be tolerated. Such conduct, however, has not been established in this case. So just as someone in Ms. Magas' position is acutely aware of the dangers presented by offences committed against the administration of justice, so too would she be aware of and endorse the time-honoured proposition that in our much valued system of justice, where serious concerns and ultimately, reasonable doubt exists respecting the reliability of what is remembered, recorded, interpreted and understood by the one and only determinative Crown witness, it would be unsafe to convict.

VII. CONCLUSION

[175] Accordingly, for the reasons already outlined, I am not able to conclude on the first question that either Constable Beattie or Constable Clark made false notes in their reports.

[176] In the result, both Constable Beattie and Constable Clark are acquitted of the one and only charge in the indictment.

Joyal, C.J.Q.B.